DEPARTMENT OF INDUSTRIAL RELATIONS
STATE OF CALIFORNIA

DECISION ON ADMINISTRATIVE APPEAL IN RE:
Public Works Coverage Determination

Re: Southern California Regional Rail
Authority Lease of Union Pacific Right-of-Way
PUBLIC WORKS CASE NO. 91-056

I. INTRODUCTION

This Decision is in response to an appeal by Southern California Regional Rail Authority from the Director of Industrial Relations' determination, dated January 4, 1993, that the construction of new rail line for the Southern California Regional Rail Authority ("SCRRA") on property leased from Union Pacific Railroad Company ("UP") is a public works project subject to the payment of prevailing wages. The Director initially determined that the elements of a public works project were met under Labor Code section 1720(a). The Director determined the construction work was performed under contract and paid for, in part, with over 29 million dollars of public funds. This Decision on Appeal affirms the initial determination finding this construction project to be a public works project (excepting certain Public Utilities Commission ordered work).

II. THE INTERESTED PARTIES

The SCRRA is a joint powers authority composed of the Los Angeles, Orange, Riverside, San Bernardino, and Ventura County Transportation Commissions. UP is a private Railroad corporation that owns and operates railroad tracks in California and throughout the United States. Neosho Construction Company ("Neosho") is a general contractor under contract with UP to perform work and provide materials for the track improvement work. The Carpenters-Contractors Cooperation Committee ("CCCC"), Inc., is a Labor-Management Cooperation Committee authorized by the National Labor Relations Act (29 U.S.C.A. section 186(c)(9). The International Union of Operating Engineers, Local 12, AFL-CIO ("Local 12") is a Union representing operating engineers. The California Department of Transportation ("Caltrans") is an Agency of the State of California. Caltrans has filed a letter brief in support of SCRRA.

III. ISSUES TO BE DECIDED

Contentions On Appeal

A. The initial determination denied due process to both SCRRA and UP.

B. The Appeal is untimely.

C. The initial determination finding the project a public works project was in error because the requirements of Labor Code section 1720(a) have not been met.

D. The project is exempt because the SCRRA funds were a grant to UP.

E. The project is exempt because the contract is merely a lease.

F. The project is exempt from the public works law because of the Federal Davis-Bacon Act, the Federal Intermodal Surface Transportation Efficiency Act of 1991, or the Federal Railway Labor Act.

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G. The project is exempt because a Public Utilities Commission ("PUC") order brings it outside the coverage of Labor Code section 1720(a).

H. The project is not a public works project because there was no competitive bidding for the construction work.

Conclusions On Appeal

A. The initial determination did not deny due process to either SCRRA or UP.

B. The Appeal is deemed timely.

C. The initial determination finding the project a public works project was correct because the requirements of Labor Code section 1720(a) have been met in that this project is a public construction project built with public funds.

D. The project is not exempt because the SCRRA funds are not a grant to UP.

E. The project is not exempt because the contract is not merely a lease.

F. The project is not exempt from the public works law because of the Federal Davis-Bacon Act, the Federal Intermodal Surface Transportation Efficiency Act of 1991, or the Federal Railway Labor Act.

G. The entire project is not exempt because of a PUC order.

H. Competitive bidding is not required to find a project to be a public works project.

IV. FACTS

A. The Construction Aspects Of The Agreements

The project is a multi-part arrangement between SCRRA and UP for the lease of land, construction of rail, and operation of a commuter rail system between the cities of Riverside and Los Angeles. The SCRRA has entered into a series of contracts to lease land from UP and spend 29 million dollars or more for the construction of rail improvements as part of a regional effort to encourage the use of rail transit. Under the lease agreement between UP and SCRRA, UP acts as general construction contractor, using both its own forces and subcontracting with other contractors to perform the rail construction. The construction of the rail improvements is taking place on private property leased to SCRRA.

In December 1991, UP and SCRRA entered into three separate agreements intended to carry out SCRRA's plan to provide commuter train service between Riverside and Los Angeles. The agreements are: the Non-exclusive Lease Agreement of Railroad Facilities ("lease agreement"); the Riverside Operating Agreement; and the Purchase and Sale Agreement. The Operating Agreement sets forth the procedures, fees, and times for operating commuter trains over the right-of-way. The Purchase and Sale Agreement provides for the sale of certain real property (East Bank of the Los Angeles River), fixtures (tracks and track support facilities) and other associated assignable rights.

The lease agreement provides for a limited lease of existing UP right-of-way. Both UP and SCRRA have qualified rights to operate over the land. The lease covers the right-of-way identified as being between mile post 56.6 (Riverside) and mile post 2.09 (Los Angeles). The term of the lease is twenty (20) years.

The lease agreement contains a provision for construction work (Section 2. Construction, pages 6-9). This is referred to as the "New Construction Program" and is the work for which the coverage determination was requested. The "New Construction Program" is only applicable to the improvements

(26.9 miles of new track parallel to the existing track and related improvements to the rail system). This section contains five subsections discussed below.

Pursuant to Subsection (a), the lessee is responsible for construction of a second track parallel to segments of existing track and the installation of a Centralized Traffic Control System ("CTC") over specific segments along the right-of-way into the lessor's East Los Angeles Yard. Under the lease agreement UP will upgrade and install a CTC over 4.4 miles of the existing main track to accommodate passenger train speeds. These improvements are being constructed entirely on land owned by UP but are paid for primarily by SCRRA. SCRRA will be responsible for all construction costs up to 29 million dollars. SCRRA and UP will share equally in the costs between 29 million and 36 million dollars and UP will be responsible for all construction cost over 36 million dollars.

Subsection 2(b) states that UP will be acting as an independent contractor for SCRRA for the construction of the improvements outlined under 2(a). UP is responsible for preparing all designs, plans, budgets and construction schedules for the project in consultation with and to be approved by SCRRA.

Subsection (c) provides for the use of outside engineering firms or contractors for the design and/or construction of the improvements. This subcontracting is subject to approval of SCRRA.

According to Subsection (e), for financial and tax purposes, all improvements in the lease agreement under (a) are "treated as leasehold improvements" and are to be considered property of SCRRA. This will allow the agency to claim depreciation on the property.[1] Section 6(d) clarifies that "upon termination of this lease . . . all Track leasehold improvements, appurtenances, and fixtures located on the Leased Premises shall automatically become the property of Lessor . . ." (pages 13-14).

B. The Non-Construction Aspects Of The Agreements

1. Buying Land and Existing Track from UP

The Purchase and Sale Agreement calls for the purchase of approximately 7 miles of track and does not call for any construction work. UP will not be performing any work on this property (East Bank of the Los Angeles River).

2. Building of Passenger Stations

Subsection (2)(d) of the lease agreement sets forth SCRRA's intention and qualified right to construct passenger facilities or stations (not more than five) on either the leased premises or adjacent to the right-of-way. However, the lease agreement does not authorize or allow for the construction of any facilities. Any such construction would be subject to a separate lease agreement.

C. Communications From The Interested Parties

An initial complaint was filed by Gene Lyon, then of Local 12, on December 18, 1991. In a follow-up letter, dated July 29, 1992, Mr. Lyon informed the Department the Neosho had been awarded two construction contracts totaling five million dollars and that another contract for ten million dollars was about to be let out to bid.

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[1] Section (B)(3) of the MEMORANDUM OF RIVERSIDE NON-EXCLUSIVE LEASE OF RAILROAD FACILITIES also states the intentions of the parties under the lease agreement with respect to use of the tracks and other improvements constructed and ownership. The pertinent section is reproduced below.

> 3. The improvements shall be owned as follows:
> (a) Prior to the termination of the Agreement, SCRRA shall own all improvements located on the Leased Premises that are constructed or installed at SCRRA's cost and expense.
> (b) At the termination of the Agreement, all such Improvements shall become property of the Railroad.

In a letter dated July 13, 1992, from Warren C. Wilson, Senior Manager, Rail Line Planning, UP stated its belief that this is not a public works project.[2] Mr. Wilson noted that neither the lease nor operating agreement refer to this as being a public works project. He further commented:

> I would like to point out that all railroad workers employed on this project are paid in accordance with collective bargaining agreements entered into with labor organizations representing such workers and that such agreements have been negotiated and ratified under the provisions of the Federal Railway Labor Act. Union Pacific Railroad is of the opinion that such collective bargaining agreements set the local prevailing wage rate as a matter of law. Union Pacific Railroad does not thereby agree, however, that the California Labor Code is applicable to construction work on trackage owned and operated by an interstate common carrier.

The letter also indicated that if a hearing were called on this matter, this position would be more fully developed.[3]

Gerald Selvo of DeCarlo, Connor and Selvo, representing the Carpenters/Contractors Cooperation Committee, Inc., contacted the Division regarding this project. Mr. Selvo was provided copies of the documents in the file and wrote an initial letter brief and an answer of appeal taking the view that the construction work was a public works project.

Richard Stanger, Executive Director, SCRRA in a July 23, 1992, letter to Bud Benson, Investigator, Carpenters/Contractors Cooperation Committee, Inc., indicated the agency position that the contracts awarded by UP for the track improvements are not public works contracts.[4] In his letter Mr. Stanger based his conclusion on four points. First, the work is being done on private property; second, the plans and the specifications for the project were prepared by UP; third, SCRRA does not have control over the construction project; and fourth UP will retain ownership of the improvements. Prior to this letter Mr. Stanger, on April 8, 1992, also provided documents to Gary J. O'Mara of this Department.[5]

Richard P. Chastang, a Deputy County Counsel for the County of Los Angeles, filed an Appeal in this matter on behalf of SCRRA. The initial notice of Appeal was dated March 8, 1993, and the actual Appeal was filed March 23, 1993. This Appeal is supported by a letter brief filed May 17, 1993, by William Bassett, an attorney for Caltrans.

The letter brief submitted by Caltrans raises several of the same arguments made by SCRRA, including the argument that ownership and control are required under Labor Code section 1720(a). Caltrans also raises some additional issues including the applicability of the public utilities exemption in Labor Code section 1720(a). In addition, Caltrans argues the inapplicability of Labor Code section 1720.2 and preemption by the Federal Intermodal Transportation Efficiency Act of 1991 and the Davis-Bacon Act. Caltrans also asserts that competitive bidding is predicate to the requirement to pay prevailing wages.

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2 This letter was in response to a letter sent by the Chief of the Division of Labor Standards Research ("DLSR") alerting Mr. Wilson to the request for a Coverage Determination filed by CCCC and soliciting his views.

3 Federal Railway Labor Act preemption is discussed in Section (V)(F), infra, on the Director's own motion to assure a complete record.

4 A copy of this letter was carbon copied to Jean Westgard, then Chief of DLSR, Richard Chastang of SCRRA, and Warren C. Wilson of UP.

5 Jack Shaw of SCRRA provided documents to Tim Stahlheber of this Department during the course of the investigation.

V. DISCUSSION

A. The Initial Determination Did Not Deny Due Process To Either SCRRA Or UP

SCRRA claims that it and UP were denied due process because it did not have notice of the ongoing investigation or the opportunity to comment during the initial determination process. The facts set out above contradict this claim. Both SCRRA and UP responded directly or by carbon copy to the Chief of the Division of Labor Standards Research ("DLSR") during the initial investigation. The Executive Director stated his view, on July 23, 1992, that the project in question was not a public works project. A senior manager for UP wrote directly to the Chief on July 13, 1992, stating a similar view. While it is certainly true that due process requires notice and an opportunity to be heard, the facts here demonstrate that both SCRRA and UP had ample notice to which both responded in writing. See Service Employees International Union Local 660 v. City of Santa Barbara (1981) 125 Cal.App.3d 459, 470, 178 Cal.Rptr. 89.

B. The Appeal Is Deemed Timely

The initial determination was served on all interested parties on January 4, 1993. SCRRA contends that the determination provided defective notice to SCRRA because it was mailed to Richard Stranger-Executive Director, SCRRA instead of to Richard Stanger, Executive Director, SCRRA. SCRRA admits that Mr. Stanger had notice of the determination no later than January 15, 1993. The notice of an intended appeal was filed March 8, 1993, and the actual appeal was filed on March 23, 1993. The fact that Mr. Stanger's name was misspelled does not seem a sufficient ground to claim defective notice in light of his knowledge of the ongoing inquiry and his participation in it.

Because of the important issues involved and the fact that similar projects raising similar issues will certainly arise the Director will reach the merits of the appeal under his own authority.[6]

C. The Initial Determination Finding The Project A Public Works Project Was Correct Because The Requirements Of Labor Code Section 1720(a) Have Been Met In That This Project Is A Public Construction Project Built With Public Funds

SCRRA contends the initial determination was in error because it will not have an ownership interest in the finished project and will not direct the construction itself. Caltrans contends that ownership, control, and competitive bidding are required for a project to be deemed a public works projects. While Labor Code section 1720(a)[7] does not appear to require that either ownership or control be present in order to establish a project as a public works project, those issues need not be decided here. On the other hand, Labor Code section 1720(a) clear does not require competitive bidding. (See section V, subsection H, infra.)

Control is required under other subsections of section 1720, such as section 1720(c), as well as other statutes in the same section of the Labor Code, such as design control in section 1720.2. It does not appear to be expressly required under Labor Code section 1720(a). Whatever control public entities seek is exercised by the process of contracting. On the facts of this record, however, the issue of a separate, extra-contractual control requirement need not be decided, because extensive control rights by the public body are found in relevant provisions within the lease.[8]

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6 Since the Director is entertaining the Appeal there is no reason to decide whether there was a mistake, inadvertence or excusable neglect under C.C.P. section 473 sufficient to merit the late filing of the Appeal.

7 Labor Code section 1720(a) defines public works as "[c]onstruction, alteration, demolition or repair work done under contract and paid for in whole or in part out of public funds, except work done directly by any public utility company pursuant to order of the Public Utilities Commission or other public authority."

8 It should be noted that SCRRA must approve virtually every aspect of the project from inception to completion. This control extends to monthly approval of all anticipated expenses of UP for the construction. SCRRA has control over the

Similar facts prevent this appeal from clearly presenting the issue whether there are separate requirements of "ownership" and "use." The lease provides that the public entity will extensively use the facilities that it is leasing until the lease ends. In fact, despite the fact that the lease expires 20 years (section 6(a) of the lease) from inception, SCRRA may still use the track after that date subject to certain conditions (see 6(e) of the lease). Thus, this does not present a scenario in which public monies are spent for construction that is not used, in any sense, by a public body, which lacks any ownership rights whatsoever as is contended here. SCRRA has an ownership interest in the tracks for the period of the lease, twenty (20) years. SCRRA gets all the tax advantages of ownership. Indeed, the assertion that the SCRRA has no ownership in the leasehold improvements is flatly contradicted by the lease itself (Section 2(e), page 8) set out above on page three. This is in contrast to the facts of McIntosh v. Aubry (Pricor) (1993) 14 Cal.App.4th 1576, 1593, 18 Cal.Rptr.2d 680, 692, in which the privately owned building was built with private money, and the only public involvement was an agreement to place emotionally disturbed minors in the facility after it was completed.

D. The Project Is Not Exempt Because The SCRRA Funds Were Not A Grant

Another basis urged upon the Director is that the funds used in the construction are really grant funds in support of public transportation. The facts of this case simply do not support the assertion that the funds paid by SCRRA to UP are a grant.

The assertion that the payment of more than 29 million dollars in exchange for construction of leasehold improvements to be used by SCRRA for 20 years is a grant seems at odds with the facts and the usual and customary understanding of the term.[9] The funds expended here are paid out with a very specific purpose in exchange for specific benefits to SCRRA. Clearly, this type of arrangement is not a grant of funds, it is a contract for construction paid for with public funds.[10]

E. The Project Is Not Exempt Because The Agreement Is Not Merely A Lease

SCRRA relies on International Brotherhood of Electrical Workers v. Board of Harbor Commissioners (1977) 68 Cal.App.3d 556, 137 Cal.Rptr. 372, apparently for the proposition that payments under a lease are not public funds. That case is readily distinguishable from the facts here. In the IBEW case, the City of Long Beach was the lessor. The City received royalties only and spent no public money. The construction was incidental to the oil and gas lease and performed with private funds by a private company. The facts here do not support any claim that this project entailed merely a lease of

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project despite its claim to the contrary. See section 2(b) of the lease that states that SCRRA must approve all plans, specifications, budgets and schedules for construction.

9 A grant usually means "to bestow or confer, with or without compensation, a gift." (See Black's Law Dictionary, 6th Edition, 1990.) More generally, a grant is a gift. (Webster's New World Dictionary, Third College Edition, 1988.) Dictionary definitions are appropriate to determine plain meaning. Mercer v. Department of Motor Vehicles (1991) 53 Cal.3d 753, 763, 280 Cal.Rptr. 745, 751.

10 Neither UP nor SCRRA have pointed to use of the term "grant" in any documents transferring the funds or providing for the construction.

a right-of-way.[11] SCRRA is expending millions of dollars in public funds, gaining the use of rail track it paid for on the leased right-of-way, for a period of twenty (20) years.[12]

The facts in this case are better compared to those of Building and Construction Trades Department, AFL-CIO, et. al. v. Turnage (D.C. 1988) 705 F.Supp. 5, 29 Wage & Hour Cas. 177, where the court found a building lease entailing substantial construction to be a "contract for construction" within the meaning of the Davis-Bacon Act (40 U.S.C.A. section 276(a) et. seq.).[13] The Court in Turnage noted that the "question is whether the Act was intended to apply to lease agreements involving the United States, or was meant to be restricted to contracts where the property is owned by the United States." The Court went on to answer:

> [t]he fact that Congress decided to make a distinction between leased and newly-built property for appropriations purposes does not necessarily imply that a similar distinction was intended when it came to the applicability of Davis-Bacon, which applies to wage rates only, rather than to the broader issue of how Congress elects to obtain property for public use. (Id. at p. 6.)

The Court reasoned that in the absence of Congressional intent to make the Act applicable only to contracts in which the only element was construction, a lease calling for construction of an out-patient clinic to be occupied by the Veterans Administration, was a "contract for construction." Given that similar language, no better defined, is used in Labor Code section 1720(a), a similar conclusion seems reasonable.

F. The Project Is Not Exempt From The Public Works Laws Because Of The Federal Davis-Bacon Act, The Federal Railway Labor Act, Or The Federal Intermodal Surface Transportation Efficiency Act Of 1991

There have been assertions by various interested parties that the Federal Davis-Bacon Act, the Federal Railway Labor Act, or the Federal Intermodal Surface Transportation Efficiency Act of 1991 preempt the public works statutes. These assertions have never been fully explained by the parties making them, but to facilitate a single appeal, they will be disposed of each in turn.

1. Davis-Bacon Act Preemption

The contention that the Davis-Bacon Act (40 U.S.C.A. section 276(a) et. seq.) exempts this project from the public works law is wholly unsupported by any authority cited. State laws can be preempted by express preemption provisions. None are found in the Davis-Bacon Act. Even when Congress has not expressly prohibited state regulation, state law may nonetheless be preempted "to the

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11 The Director does not consider the applicability of Labor Code section 1720.2 because that section is specific to a lease of a building and is clearly not applicable to the lease of a railroad right-of-way. The lease of a railroad right-of way is more akin the lease of raw land. See McIntosh v. Aubry (Pricor) (1993) 14 Cal.App.4th 1576, 1584, 18 Cal.Rptr.2d 680, 686. Finally, the Director has previously held that Labor Code section 1720.2 relates to a specific building and does not include surrounding land. See Decision on Administrative Appeal, In Re: Public Works Coverage Determination, 2424 Arden Way, Sacramento, California (Public Works Case No. 91-037, April 20, 1992).

12 No interested party has disputed the fact that the funds used to build this project are anything other than public funds.

13 40 U.S.C.A. section 276(a) states, in relevant part, "[t]he advertised specifications for every contract in excess of $2,000, to which the United States or the District of Columbia is a party, for construction, alteration, and/or repair, including painting and decorating, of public buildings or public works of the United States or the District of Columbia ... and which requires or involves the employment of mechanics and/or laborers shall contain a provision stating the minimum wages to be paid."

extent that it actually conflicts with federal law." Such a conflict will only be found when the state law "stands as an obstacle to the accomplishment" of the purposes of the federal law. Hillsborough County v. Automated Medical Laboratories, (1985) 471 U.S. 707, 713, 105 S.Ct. 2371. Cf. 54 Ops.Cal.Atty.Gen. 31, 35-36 (1971). No evidence of such practical conflict has been put into the record, and independent review by the Director has located no Congressional intent to preempt the state law where state funds are used. No party has put in the record any evidence that federal funds were used. In fact, material supplied by SCRRA late in the appeal process indicates that all of the money used to pay for the construction came from either local tax revenues or bond proceeds under Proposition 108.[14]

No party has offered any authority that implies federal Davis-Bacon Act preemption of state prevailing wage requirements.[15] An argument for implied preemption would have to start with a showing that the Davis-Bacon Act applied. One reason that it does not apply here because there is no federal money. Even if there were, the federal act under which the monies had been lent or granted would have to have specified that Davis-Bacon applies. When the Congress wants Davis-Bacon Act's wage provisions to apply to a contract led by a state, it makes its intention known expressly. See, e.g., Housing Act of 1937, 42 U.S.C.A. sections 1437, 1437(j).

2. Intermodal Surface Transportation Efficiency Act Of 1991 Preemption

The contention that the Intermodal Surface Transportation Efficiency Act of 1991 (49 U.S.C.A. section 101 et. seq.),[16], preempts the state public works law is equally unpersuasive for similar reasons. There is no federal money. If there were, the Act itself is not among the acts to which the Davis-Bacon Act applies.[17] The Director's independent review of 23 U.S.C.A. section 130 et. seq. finds no indication that this section of the Act, even if it were applicable, reflects a Congressional intent to preempt state minimum wage laws applicable to public works projects. The Congressional intent appears to be to fund an aid program to assist state and local governments undertaking railroad crossing projects to protect public safety. When the Congress wants the Davis-Bacon Act to apply to a transit grant enactment, it makes its intention known expressly by statute. See, e.g., Urban Mass Transit Act of 1964, 49 U.S.C.A. section 1609.

Caltrans cites several programs that it administers, all without any requirement to pay prevailing wages. Those projects are not before the Department for coverage determinations nor have full records been developed on those projects. In any case, the projects cited seem factually distinguishable from the present case. There is no grant of state funds present in this case and in those cases where Caltrans asserts a grant of state funds the amounts are apparently much smaller (and for a much more limited purpose) than the sum of money involved in this case. There are no federal funds used on this project.

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14 This information was provided by facsimile copy on September 13, 1993, by Richard Chastang. Proposition 108, the Passenger Rail and Clean Air Bond Act of 1990 (Streets & Highways Code section 2701 et. seq.), was passed by voters in the June 5, 1990, primary election. This act is one of three proposed bond acts by the legislature to fund rail improvements. The bonds are a binding obligation of the state and are backed by the full faith and credit of the State of California (Streets and Highways Code section 2701.10). According to the Financial Plan, chart X, $17.8 million comes from the five county governments involved and $36.9 million comes from the bond act proceeds to pay for the various capital improvements necessary to complete the project Apparently the bond act funds are being used to construct the rail improvements, local funds are being used to construct the five passenger stations and necessary appurtenances mentioned earlier (at p. 4). The passenger stations are not subject to this decision. The discrepancy between the sums proposed in the lease and the amount of the allocation of Proposition 108 funds is not relevant to this decision.

15 The California Attorney General has stated that the opposite is true. The Davis-Bacon Act specifically encourages state public works laws. See 54 Ops.Cal.Atty.Gen. 31, 35-36 (1971).

16 This section is apparently the 1991 enabling statute. The majority of the act is located in Title 23 of the United States Code.

17 See 29 C.F.R. section 1.1, Appendix A, lists 58 separate acts requiring the application of the Davis-Bacon Act prevailing wage provisions. The Intermodal Surface Transportation Efficiency Act of 1991 is not one of them.

Subcontractors are being employed by UP to do much of the construction, as opposed to work done by the railroad's own forces. Finally, only a small part of the work involved in this project is the subject of a PUC order.

3. Railway Labor Act Preemption

The last preemption argument is that the Railway Labor Act (45 U.S.C.A. section 151 et. seq.) somehow preempts the state public works law. The reasoning implied in this argument is that the state is attempting to interfere with a collective bargaining agreement in violation of the Railway Labor Act. Such interference into the labor-management relationship, if present, is usually prohibited. See Price v. PSA (9th Cir. 1987) 829 F.2d 871, 875. The activity of the Director in determining this project a public works project does not interfere with the existing collective bargaining agreement. "States possess broad authority under their police powers to regulate the employment relationship within the State. Child labor laws, minimum and other wage laws, laws affecting occupational health and safety . . . are only a few examples." Metropolitan Life Ins. Co. v. Massachusetts (1985) 471 U.S. 724, 756, 105 S.Ct. 2380.

Further, the coverage determination precedes any attempt to set prevailing wages or enforce them. In addition, there are subcontractors being hired for the project. There has been no allegation that these subcontractors are covered by any collective bargaining agreement. As stated in DeTomaso v. Pan American World Airways, Inc. (1987) 43 Cal.3d 517, 529, 235 Cal.Rptr. 292, 299, "preemption must . . . *extend to any claim premised on facts inextricably intertwined" with the collective bargaining agreement.* There is no valid reason, at this time, to conclude that a coverage determination on the project will interfere with the terms of the collective bargaining agreement. The fact that collective bargaining agreements deal with wages, and prevailing wage laws deal with wages, means only that the rights they create are parallel, but not that the enforcement of the state-based rights involves interpretation of the collective bargaining agreement. See Lingle v. Norge Div. of Magic Chef (1988) 486 U.S. 399, 108 S.Ct. 1877 (parallel rights to be free from retaliation for filing workers' compensation claims under both collective bargaining agreement and state law does not require Labor Management Relations Act preemption).

G. The Entire Project Is Not Exempt Because Of A Public Utilities Commission Order

Caltrans asserts that the project is exempt because of a PUC order involving the grade crossings. The CCCC contends that this is only a small part of the overall work and that the work is only incidental to the much larger overall project. This latter contention is correct. The exemption in Labor Code section 1720(a) is very specific. The exemption applies to work done directly by any public utility company pursuant to an order of the PUC or other public authority. A public utility is defined in Public Utilities Code section 216 and includes common carriers. Public Utilities Code section 211 defines common carrier to include railroads. Thus, some portion of the work may be exempt if it is done directly by the Railroad and done under order of the PUC or other public authority.

Caltrans ignores the fact that the statutes it cites, Public Utilities Code sections 1201 and 1202 deal specifically and only with grade crossings. Nothing in the statutes themselves give any indication that PUC ordered work involving grade-crossings exempts an entire project of which the grade crossing work is only a minuscule part. Caltrans cites no authority to this effect and the Director has found none. Caltrans' assertion that the "state's right is merely a licensed use, pursuant to PUC order" does not explain how the PUC ordered grade crossing work exempts the entire project. The Director finds that such an order does not exempt the entire project.

The exclusion covers PUC ordered work that is done by a public utility company with its own forces.[18] This reading is consistent with the two requirements in section 1720(a), work done under

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18 "Directly" is defined as "with nothing or no one or anything between *[directly responsible]*" by Webster's New World Dictionary, Third College Edition (1988). Black's Law Dictionary, 6th Edition (1990), defines directly as "[i]n a direct way without anything intervening; not by secondary, but by direct, means." Dictionary definitions are appropriate to determine plain meaning. Mercer v. Department of Motor Vehicles (1991) 53 Cal.3d 753, 763, 280 Cal.Rptr. 745, 751.

contract and paid for, in part, with public funds. Reading the statute so that the exemption does not depend on whether the work is done by UP with its own forces would make the word "directly" superfluous.[19] If the Legislature did not mean to say that the work need be done by a public utility's own forces it did not need to say "directly." It could merely have said "*except work done by any public utility company pursuant to order of the Railroad Commission or other public authority.*" This language would have accomplished the same effect without confusing the definition by using a superfluous word.

The specific facts are not presented in such detail that the Director can determine the percentage of the work to be done directly by UP as opposed to Neosho and any other subcontractor doing work on the project. A limited exemption would apply to that portion of the work done directly by UP forces under order of the PUC.[20] The exemption does not apply to the entire project simply because some minuscule portion of the work involved is the subject of a PUC order performed directly by UP.

H. Competitive Bidding Is Not Required To Find A Project To Be A Public Works

While competitive bidding is required in many instances by the Public Contract Code, nothing in the Labor Code indicates that competitive bidding is a predicate to a determination that a project is a public works project. Caltrans' assertion that competitive bidding is required lacks any citations to any authority. Public Contracts Code section 1101 defines a "public works contract" to mean "an agreement for the erection, construction, alteration, repair or improvement of any public structure, building, road, or other public improvement of any kind." Nothing in this section indicates that the contract must be competitively bid to be a public works contract.

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19 "A fundamental rule of statutory construction is that a court should ascertain the intent of the Legislature so as to effectuate the purpose of the law. In construing a statute, our first task is to look to the language of the statute itself. When the language is clear and there is no uncertainty as to the legislative intent, we look no further and simply enforce the statute according to its terms....We are required to give effect to statutes according to the usual, ordinary import of the language employed in framing them. If possible, significance should be given to every word, phrase, sentence and part of an act in pursuance of the legislative purpose. When used in a statute [words] must be construed in context, keeping in mind the nature and obvious purpose of the statute where they appear. Moreover, the various parts of a statutory enactment must be harmonized by considering the particular clause or section in the context of the statutory framework as a whole." Dubois v. Workers' Compensation Appeals Board (1993) 5 Cal.4th. 382, 387-388, 20 Cal.Rptr.2d 523, 525-526. (citations and internal quotation marks omitted.)

20 Richard Chastang, in a telephone call made on September 13, 1993, to Gary O'Mara, conceded that the PUC ordered work was a "minuscule" portion of the project and that the vast majority of the work was done under contracts having nothing to do with the PUC ordered work. He stated that this characterization was made by Richard Stanger, Executive Director of the SCRRA.

Further, courts have long excused competitive bidding where it would serve no useful purpose. Graydon v. Pasadena Redevelopment Agency (1980) 104 Cal.App.3d 631, 635-636, 164 Cal.Rptr. 56, 58-59. This is especially true where a particular contract calls for expertise in a unique type of construction by a regulated public utility such as UP. See County of Riverside v. Whitlock (1972) 22 Cal.App.3d 863, 878, 99 Cal.Rptr. 710, 720.[21] Finally, there is nothing in the record to indicate that UP, as the agent of SCRRA, did not use competitive bidding in selecting the subcontractors, thus potentially saving itself money due to the financing scheme used on the project and achieving the same efficiencies sought by the Public Contracts Code. See Public Contracts Code sections 100 through 102, stating the Legislature's intent in requiring competitive bidding in the letting of most public contracts.

VI. CONCLUSION

For the foregoing reasons the initial determination that this project is a public works project is affirmed except as to work done pursuant to the public utility exemption in Labor Code section 1720(a). This matter is referred to the Labor Commissioner for enforcement.

DATED: 11/30/93

Lloyd W. Aubry, Jr., Director

21 One of the purposes of the public works law is "to benefit the public through the superior efficiency of well-paid employees." Lusardi Construction Company v. Aubry (1992) 1 Cal.4th 976, 987, 4 Cal.Rptr.2d 837, 843. Clearly, UP's expertise in the construction and operation of a railroad allows it such superior efficiency.